No. 13,678

IN THE

United States Court of Appeals

For the Ninth Circuit

ARNOLD SWARTZ and MAX GOODMAN,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the District Court of the United States for the District of Hawaii.

APPELLANTS' PETITION FOR A REHEARING.

HYMAN M. GREENSTEIN,
408 National Building, Honolulu, Hawaii,
Attorney for Appellants and Petitioners.

BERNAL-WALSH PRINTING CO., SAN FRANCISCO

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To the Honorable William Denman, Chief Judge, and to the Honorable Associate Judges of the United States Court of Appeals for the Ninth Circuit:

Appellants hereby petition this Honorable Court for a rehearing in the above entitled cause and with respect urge the following grounds:

1. This Circuit Court has not given full consideration to the distinction between the offense of *concealing* stolen government property as compared with the offense of *receiving* such property.

a. The instant appeal involves the offense of *concealing* stolen government property. Appel-

lants were not charged nor tried for the offense of *receiving* such property.

b. There must be sufficient proof of *each* and *every element* of the offense charged as to *both* appellants.

2. There was a *total lack of evidence* as to one or more of the elements of the offense charged, as to each appellant.

ARGUMENT.

It should be pointed out that appellants do not quarrel with the substantive law enunciated by this Court and do not ask this Court to weigh the evidence. We simply state that as to each appellant THERE WAS ABSOLUTELY NO EVIDENCE at all of the existence of all the elements of the offense charged insofar as each appellant was concerned.

It is felt that the Court has failed to give full consideration to each element of the offense charged as to each appellant, keeping in mind the difference between the offense of *concealing* in contradistinction to that of *receiving* stolen property.

And in this connection it should be kept in mind that appellants were not charged under any conspiracy count. They are accountable under the law only insofar as their own individual actions and conduct are concerned and proved hereunder.

Suspicion is not enough. What the law requires is evidence—and some evidence as to each and every element of the offense charged.

AS TO APPELLANT ARNOLD SWARTZ.

1. There is absolutely no evidence in the record that Swartz had anything to do with the shipment of any zinc to California.

2. There is no evidence in the record that Swartz had anything to do with the holding of the zinc in California for further disposition or instructions.

3. There is no evidence in the record that the zinc shipped to the California concern was the same zinc as was stolen from the government.

4. There is no evidence in the record that the appellant Swartz concealed the stolen zinc.

5. There is no evidence in the record that the appellant Swartz participated in any act toward converting the stolen zinc to his own gain and use.

AS TO APPELLANT MAX GOODMAN.

1. There is absolutely no evidence in the record that Goodman had anything to do with the purchase of the zinc; nor is there any evidence that he had knowledge that it was stolen.

2. There is no evidence in the record that Goodman personally had anything to do with the shipment of the zinc to California.

3. There is no evidence in the record that the zinc shipped to the California concern was the same zinc as was stolen from the government.

4. There is no affirmative evidence in the record that appellant Goodman concealed the stolen zinc.

That Goodman gave an incorrect statement to the FBI agent as to whether any zinc had been shipped is not evidence of concealment. The fact is that the agent was informed (although late) of the existence of the zinc on the West Coast. A man should not be convicted on suspicion alone—the circumstances when measured by the volume of business transacted by Goodman would, it seems, militate against assuming wrongful conduct on the part of appellant Goodman just because the FBI agent was misinformed, or a file missing.

CONCLUSION.

That the evidence presented a "bothersome problem" to the trial judge (R. 490) and presented "difficulties" to one of the Circuit Judges (Concurring Opinion) lends emphasis to the contention of these appellants who respectfully pray that reconsideration be given them of the issues herein, for the rea-

sons stated above, to the end that a rehearing be granted, and that upon such rehearing the judgment, conviction and sentence of the Court below be reversed and that, pending final disposition of this cause, the issuance of the mandate of this Court be stayed.

Dated, Honolulu, Hawaii,
November 16, 1953.

Respectfully submitted,
HYMAN M. GREENSTEIN,
Attorney for Appellants and Petitioners.

Certificate of Counsel.

I hereby certify that I am a member of the bar of the United States Court of Appeals for the Ninth Circuit and that I am counsel for petitioners (appellants) in the above entitled cause, and that, in my judgment, the foregoing petition is well grounded in point of law as well as in fact, and that said petition is not interposed for delay.

Dated, Honolulu, Hawaii,
November 16, 1953.

Hyman M. Greenstein,
Attorney for Appellants and Petitioners.